ATTACHMENT 2

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

(1) COX OKLAHOMA TELCOM, L.L.C.,	)	
	)	Case No. CIV-04-1282-L
Plaintiff,	)	
	)	
v.	)	**MOTION TO STAY**
	)	**BASED ON PRIMARY**
(1) CORPORATION COMMISSION OF	)	**JURISDICTION OF THE**
THE STATE OF OKLAHOMA, and	)	**FEDERAL**
(2) SOUTHWESTERN BELL TELEPHONE,	)	**COMMUNICATIONS**
L.P., d/b/a SBC OKLAHOMA,	)	**COMMISSION AND**
	)	**AND BRIEF IN**
Defendants.	)	**SUPPORT THEREOF**

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MOTION TO STAY BASED ON THE PRIMARY JURISDICTION OF THE FEDERAL COMMUNICATIONS COMMISSION

Plaintiff Cox Oklahoma Telcom, L.L.C. ("Cox") respectfully moves for a limited stay of further proceedings in this action based on the primary jurisdiction of the Federal Communications Commission ("FCC"). Today, Cox is filing a petition for a declaratory ruling at the FCC seeking resolution of the same principal legal issues that are raised in the Complaint in this case. These issues fall squarely within the technical expertise and authority of the FCC; Congress entrusted their resolution to the FCC as the expert agency responsible for setting uniform national policy on these issues, and the FCC has already established rules on the subject. This Court would benefit from the FCC's ruling before deciding the issues here, and, in fact, the FCC's decision is likely to result in the rapid resolution of this litigation. Accordingly, the doctrine of primary jurisdiction is directly applicable here, and Cox requests a limited stay until the FCC rules in the parallel proceeding or for six months, whichever occurs first, with Cox to report to the Court at that time.

1. The Complaint involves complex technical and policy issues within the FCC's primary jurisdiction over telecommunications services, as established by Congress under Title II of the Communications Act of 1934, as modified by the Telecommunications Act of 1996, 47 U.S.C. §§ 251 et seq.

2. Specifically, the Complaint challenges a decision of Defendant Corporation Commission of the State of Oklahoma ("OCC"), which denied Cox direct physical access to inside wire subloops owned by Defendant Southwestern Bell Telephone, L.P., d/b/a SBC Oklahoma ("SWBT") based on, among other errors, the

OCC's erroneous interpretation of federal law and the FCC's rules and orders governing local telephone competition.

3. The Complaint necessarily raises complex technical and national policy issues concerning the obligation of an incumbent local exchange carrier (SWBT) to enable competition for local telephone service by allowing competitors direct access to certain critical equipment within multi-tenant environments ("MTEs") (e.g., condominiums, apartment buildings).

4. The FCC is currently considering precisely the same issues in a parallel proceeding that Cox has filed today. A copy of Cox's Petition for Declaratory Ruling is attached hereto as Exhibit A.

5. The doctrine of primary jurisdiction is well-established and directly applicable here, because Congress delegated authority over the issues raised in this action to the FCC as the expert agency responsible for establishing national telecommunications regulatory policy, and awaiting resolution of the pending FCC proceeding will assist the Court in resolving the issues in this suit in accordance with uniform national rules regulating local telephone competition.

6. Neither SWBT nor the OCC would be prejudiced as a result of granting the stay, because (a) the OCC's decision remains in effect pending resolution of this case, (b) either defendant may participate fully in the FCC's proceeding, and (c) the record on review here is set and will not become stale as a result of the passage of time while awaiting the federal agency's ruling.

LEGAL AUTHORITY AND BRIEF IN SUPPORT OF MOTION

I. INTRODUCTION

The federal doctrine of primary jurisdiction justifies a limited stay here. The FCC is considering the same issues this Court would have to resolve in this case, and these are issues of national importance that Congress has placed within the FCC's primary jurisdiction. The initial expert review and decision of the FCC will further the goal of a uniform national telecommunications policy and will provide the Court with material guidance to assist in the adjudication of Cox's central claims. *In re Starnet, Inc.*, 355 F.3d 634, 639 (7th Cir. 2004) (deferring to FCC's primary jurisdiction and staying action pending FCC's determination as to meaning of contested term used in Telecommunications Act).

"It is well settled that the district court has the power to stay proceedings pending before it and to control its docket for the purpose of 'economy of time and effort for itself, for counsel, and for litigants.'" *Pet Milk Co. v. Ritter*, 323 F.2d 586, 588 (10th Cir. 1963) (quoting *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). The granting of a stay ordinarily lies within the sound discretion of the district court. *Id.*; *Coseka Resources (U.S.A.) Ltd. v. Jordan*, 75 F.R.D. 694, 696 (W.D. Okla. 1977). Granting Cox's motion would serve the interests of judicial "economy of time and effort" by allowing the FCC to adjudicate the issues first, thus expediting the resolution of this case once the results of the parallel administrative proceeding are presented to this Court.

The Court should stay this action because where, as here, the same issues are pending before a court and the expert agency to which Congress delegated regulatory authority, the law is clear: The court should stay the case in deference to the agency's primary jurisdiction. Congress charged the FCC with responsibility for national telecommunications policy and its comprehensive and uniform implementation; further, pursuant to 47 U.S.C. §§ 251 and 252 of the Communications Act, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"), the FCC's authority extends to the regulation of local telephone competition.

In fact, the FCC has already exercised its authority in connection with the key issues in the Complaint; namely, whether direct physical access to the "inside wiring" is required under federal law; whether direct physical access at the accessible terminal is a technically feasible method of obtaining access to inside wire subloops and, if so, whether an incumbent local exchange carrier ("ILEC") is excused from providing direct physical access to a competitive local exchange carrier ("CLEC") based on claims concerning network integrity; and whether the demarcation point for control of wiring necessarily must be at the same location as the network interface device.

The OCC's decision is inconsistent with relevant and controlling FCC decisions, however, and Cox has asked the FCC for a declaratory ruling that clarifies and confirms these federal rules. Specifically, Cox has asked the FCC to make plain that a CLEC's right of access to an ILEC's inside wire subloop requires ILECs to permit CLECs' technicians direct access to the inside wire subloop to perform installations. In addition, Cox has presented to the FCC the facts underlying this federal case to ensure that the FCC's ruling will address directly the OCC's decision below.

Deferral to the FCC under the primary-jurisdiction doctrine is particularly appropriate here, because the key questions presented are best suited for FCC review in the first instance as the expert administrative agency, and because the issues have been presented to the FCC for consideration. A stay of this action pending an FCC determination also furthers the goals of ensuring a uniform national telecommunications policy and providing material assistance to the Court in adjudicating this case.

II. BACKGROUND

A. Factual Background

Cox has provided telecommunications services to Oklahoma business customers since 1997 and to Oklahoma residential customers since 1999. Cox's parent company and affiliates combine to make one of the leading CLECs in the United States, with over 100,000 business customers and more than 1.2 million residential lines in service. Cox seeks to provide competitive local telephone service to thousands of residents in MTEs throughout Oklahoma, but the OCC's ruling has made it cost-prohibitive to use the ILEC's inside wire subloops to do so. SWBT is the ILEC in certain of the Oklahoma service territories in which Cox operates.

In many locations, Cox is currently able to offer services using its own facilities entirely, and Cox has invested billions of dollars to make this possible. In apartment buildings and other MTEs, however, Cox often is forced to rely on the "inside wire subloop" to reach customers and potential customers. The inside wire subloop is a pair of wires running from (a) the accessible terminal (i.e., terminal equipment that is accessible to service technicians), typically mounted on the outside wall of an apartment building, to (b) the first telephone jack in a customer's office or apartment. Each inside wire subloop is dedicated to, and solely provides service to, a particular individual office or apartment. SWBT owns or controls most (though not all) inside wire subloops in Oklahoma MTEs.

To provide service to customers and potential customers in MTEs, Cox must gain access to these inside wire subloop facilities, which in turn requires that Cox enter into an "interconnection agreement" ("ICA") with the ILEC, here SWBT. ICAs are contracts subject to federal regulatory requirements that ensure competitive access on reasonable terms and conditions under Sections 251 and 252 of the Communications Act. ICAs also must be submitted to the applicable state commission for approval. 47 U.S.C. § 252(e)(1). On or about April 10, 1997, Cox and SWBT entered into an ICA, which the OCC approved by Order No. 412966, dated May 28, 1997. In 2002, Cox and SWBT entered into a new interconnection agreement, approved by the OCC by Order No. 466056, dated July 26, 2002. Neither ICA contains terms or provisions concerning the inside wire subloop.

Cox attempted to negotiate with SWBT for reasonable terms upon which to access the inside wire subloops, but this effort was unsuccessful because SWBT refused to comply with federal requirements in negotiating access terms in the ICA with Cox. Pursuant to federal statutory law, Cox initiated the underlying arbitration to seek relief. In connection with the arbitration proceeding, Cox asserted that the new provisions added by the 1996 Act and the FCC's rules and orders guarantee that CLECs' technicians must be given direct physical access to SWBT's inside wire subloops at existing SWBT terminals for the purpose of accomplishing installation and service changes. Cox had proposed rates, terms, and conditions that recognized a CLEC's right to access, including (1) rates that Cox would have to pay SWBT for a monthly, recurring, per-line fee, but not for the cost of physically providing cross-connect or conduit installation services, as those activities would be performed by Cox technicians, not those of SWBT; and (2) rates that would apply if Cox technicians were unable to gain access to SWBT's terminal using SWBT's approved standards and practices, in which case Cox would provide a service order to SWBT and pay for the cost of a SWBT technician to make a service call to provide physical cross-connect and conduit installation services.

SWBT, on the other hand, had proposed three complex, excessively time-consuming and costly options, each of which would require that Cox utilize SWBT technicians to provide access to the inside wire subloop and pay prohibitively high rates for those services. Indeed, two of the three SWBT proposals also would require Cox to construct, or pay SWBT to construct on its behalf, unnecessary intermediate facilities. In effect, SWBT's proposals deny Cox's right of direct physical access because they force Cox to employ burdensome ordering procedures, to undertake time-consuming and needless construction of new facilities, to pay excessive fees, and to rely on SWBT technicians to establish connections for customers in MTEs who wish to subscribe to Cox's telephone services (causing further delay).

Even though all three of SWBT's options preclude Cox from competing on a cost-effective basis with SWBT for customers in MTEs—thereby frustrating Congress's goal of fostering local telephone competition—the arbitrator approved the ICA on SWBT's terms, and the OCC's final order adopted the arbitrator's decision.

Cox now challenges the OCC's decision in federal district court, as provided for by statute, contending that, among other errors, the OCC erroneously interpreted the 1996 Act and the FCC's rules and orders governing competitive access to an ILEC's inside wire subloop when it denied Cox direct physical access.

B. Regulatory History

1. The 1996 Act Delineates Clear and Distinct Roles for the States and for the FCC.

Congress passed the 1996 Act to promote competition in local telephone service markets by ending regulated monopolies previously enjoyed by ILECs such as SWBT. Before Congress enacted the 1996 Act, state public utility commissions regulated local telecommunications markets by granting companies that established local telephone networks the exclusive right to provide service in the areas covered by their systems; in exchange, the state commissions regulated those companies' local service rates and practices.

The 1996 Act refashioned this scheme in an effort to address the underlying problem of anticompetitive local telecommunications markets. Congress accomplished this in the 1996 Act by imposing a system of federal regulation in which state commissions play a distinct but restricted role. Thus, the 1996 Act amended the Communications Act to impose rules specifically designed to allow CLECs to use some or all of the ILECs' established networks to offer competitive local telephone service. Section 251 of the Communications Act outlines the various obligations of ILECs to share their networks with competitors to promote market entry by CLECs, and also details the rules implementing the general duty of telecommunications carriers to interconnect with each other's equipment and facilities. *See* 47 U.S.C. § 251.

For example, when a CLEC seeks to enter a new market, the ILEC must "provide . . . interconnection with" its network, § 251(c)(2), and the parties must establish "reciprocal compensation arrangements" for transporting and terminating the calls placed by each others' customers, *see* § 251(b)(5). In addition, Section 251 sets forth the substantive ways in which potential competitors may enter local telephone markets by using an incumbent provider's existing networks, including the ILEC's duty to provide interconnection with the ILEC's network. *See* 47 U.S.C. §§ 251(c)(2).

The 1996 Act also added Section 252, which outlines the procedural rules by which CLECs may access an incumbent carrier's network or services to enable them to provide competitive local telephone services pursuant to Section 251. Specifically, Section 252 codifies the framework for the negotiation, arbitration and approval of interconnection agreements between ILECs and CLECs. *See* 47 U.S.C. § 252. For example, ILECs are obligated to negotiate interconnection agreements in good faith with CLECs, and the statute sets forth particular terms and conditions upon which incumbent carriers will satisfy their duties under federal law. *See* 47 U.S.C. § 251(c)(1). Should the negotiations fail, either party may petition the state commission for arbitration of any unresolved issues. *See* 47 U.S.C. § 252(b)(1). A state commission may impose terms by arbitration, but only if the terms meet the substantive requirements of Section 251, including the regulations implementing that section, or the pricing standards set forth in Section 252(d). *See* 47 U.S.C. § 252(c). All agreements, whether adopted by negotiation or arbitration, are subject to review by the state commission. *See* 47 U.S.C. § 252(e). Following the state commission's approval of an ICA, a party to the agreement may challenge a state commission's determination by bringing an action in district court "to determine whether the agreement or statement meets the requirements" of the provisions added by 1996 Act. 47 U.S.C. § 252(e)(6).

2. The FCC's Mandate Under the 1996 Act Includes Regulation of Local Telephone Competition.

The 1996 Act amended the Communications Act to alter the relative regulatory roles and authority of states and the FCC in the development of local telephone competition. Before the 1996 Act, states had the primary role. After the 1996 Act was promulgated, the FCC has the lead in setting the basic rules that enable competition. As the Supreme Court explained in *Iowa Utilities Board:*

> We think that the grant in §201(b) means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include §§251 and 252, added by the Telecommunications Act of 1996.

AT&T v. Iowa Utils. Bd., 525 U.S. 366, 378 (1998) (footnote omitted). To emphasize this point, the Court went on to say that "the question in [this] case[] is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." *Id.,* 525 U.S. at 378, n.6.

In this regulatory scheme, the FCC's role is to adopt rules governing local competition and to interpret them. The states implement the rules, consistent with the requirements of the statutory provisions added by the 1996 Act and the FCC's interpretations. *See U.S. Telecom Ass'n v. FCC,* 359 F.3d 544, 568 (D.C. Cir. 2004) (reversing certain elements of the *Triennial UNE Decision* because FCC delegated too much authority to the states). In particular, the FCC adopted rules concerning inside wire subloops, most recently in the *Triennial UNE Order*, see In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 16978, 17185 (2003) ("*Triennial UNE Order*"), and also has interpreted those requirements, both in the *Triennial UNE Order* and in other decisions it has issued.

Naturally, the courts have acknowledged that the FCC, as the agency charged with adopting rules under the local competition provisions of the Communications Act, is the expert agency. For instance, the Supreme Court deferred to the FCC's interpretation of the statute when it reviewed a rule governing adoption of interconnection agreements in the *Iowa Utilities Board* decision. It noted that the judgment concerning the appropriateness of the rule was "a matter eminently within the expertise of the Commission and eminently beyond our ken[]" and that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency[.]" *Iowa Utils. Bd.,* 525 U.S. at 396, 397. In other words, the FCC has been charged with developing the regulatory regime for local telephone competition, and it is appropriate to seek the FCC's guidance as to such matters.

III. LEGAL AUTHORITY

"The doctrine of primary jurisdiction . . . is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Williams Pipe Line Co. v. Empire Gas Corp.*, 76 F.3d 1491, 1496 (10th Cir. 1996) (quoting *United States v. W. Pac. R.R.*, 352 U.S. 59, 63 (1956)). Primary jurisdiction applies "in situations where the courts have jurisdiction over the claim from the very outset but it is likely that the case will require resolution of issues which, under a regulatory scheme, have been placed in the hands of an administrative body." *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1038 (10th

Cir. 1993) (quoting *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1376 (10th Cir. 1989)).

In *Williams Pipe Line*, the Tenth Circuit discussed the doctrine of primary jurisdiction:

> The doctrine of primary jurisdiction allows a federal court to refer a matter extending beyond the "conventional experiences of judges" or "falling within the realm of administrative discretion" to an administrative agency with more specialized experience, expertise, and insight. Specifically, courts apply primary jurisdiction to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency.

76 F.3d at 1496 (quoting *Nat'l Communications Ass'n v. Am. Tel. & Tel. Co.*, 46 F.3d 220, 223 (2d Cir. 1995)). When primary jurisdiction is invoked, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *W. Pac. R.R.*, 352 U.S. at 64; *accord Marshall*, 874 F.2d at 1376. Thus, the doctrine serves both (a) to promote the use of agencies' experience and expertise when courts are presented with questions outside their conventional expertise, and (b) to ensure uniformity with respect to certain types of administrative questions. *W. Pac. R.R.*, 352 U.S. at 64; *Williams Pipe Line*, 76 F.3d at 1496.

There is no fixed formula for determining whether primary jurisdiction applies. Rather, the Tenth Circuit considers the following factors relevant in making referral determinations under the doctrine: whether the issues of fact concern matters outside the conventional experience of judges; whether they require the exercise of administrative discretion; or whether they require consistency in the regulation of the matters entrusted to the relevant administrative agency. *See Mical Communications*, 1 F.3d at 1038, 1040 (listing factors; remanding case to district court with instructions that it stay action under Communications Act of 1934 pending issuance of dispositive ruling by FCC); *see also In* *re Universal Serv. Fund Tele. Billing Practices Litig.*, 300 F. Supp. 2d 1107, 1152 (D. Kan. 2003) (noting that "courts should generally refer matters to administrative agencies" where one of the factors is met; referring to FCC plaintiffs' claims under Federal Communications Act).

Here, the Complaint raises complex technical and policy issues that are outside the ordinary expertise of the judges and that require uniform national application.

A. The Court Should Defer to the FCC's Primary Jurisdiction Because the Complaint Raises Complex Technical and Policy Issues Within the Agency's Unique Expertise.

1. Congress Entrusted Telecommunications Issues to the FCC for its Special Expertise.

Congress created the FCC and specifically vested the agency with broad powers to develop and implement national communications policy, to establish a comprehensive communications regulatory system, and to administer that system. *See* 47 U.S.C. § 151 (creating the FCC "for the purpose of securing a more effective execution of [communications] policy by centralizing authority"). *See also Pac. Tel. & Tel. Co. v. MCI Telcomms. Corp.*, 649 F.2d 1315, 1321 (9th Cir. 1981) (noting that the FCC is "the agency charged with the complex administrative task of regulating the communications industry"). The FCC's subject matter jurisdiction is broad, covering all forms of interstate and foreign commerce in communication by wire or radio, including by telephone. *See* 47 U.S.C. § 151. Specifically, Congress delegated to the FCC by statute broad authority to establish a comprehensive national policy and to derive appropriate rules for the regulation of the telecommunications industry in the public interest, including the regulation of competition between local exchange carriers. *See* 47 U.S.C. §§ 201-205, 251.

2. The Central Issues Raised in the Complaint Implicate Technical and Policy Issues that Are Within the Expertise of, and Are Now Pending Before, the FCC.

The Complaint raises issues over which the FCC has exercised jurisdiction and pronounced controlling federal rules that would apply to any review of the OCC's decision below. These include whether direct physical access is required under federal law; whether direct physical access at the accessible terminal is a technically feasible method of obtaining access to inside wire subloops; if so, whether an ILEC is excused from providing direct physical access based on claims concerning network integrity; and whether the demarcation point for control of wiring must be at the same location as the network interface device. In light of the OCC's decision, Cox has asked the FCC to issue a declaratory ruling that affirmatively clarifies, for example, that a CLEC's right of access to an ILEC's inside wire subloop in MTEs requires incumbent carriers to permit a competitor's technicians direct access to the inside wire subloop to perform installations.

Specifically, the Complaint alleges that the OCC's decision below should be vacated, because, under the Communications Act and the FCC's rules, CLECs have a right to obtain access to an ILEC's subloops at any technically feasible accessible terminal along the ILECs' distribution path. *See* 47 C.F.R. § 51.319(a)(2); In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 16978, 17185 (2003) ("*Triennial UNE Order*"). The Complaint avers that, for CLECs attempting to access customers in MTEs, the most practical place to gain access to the subloops is at the ILEC's terminal block, where network wiring is disaggregated into individual customer inside wiring.

These are issues well within the special expertise and regulatory responsibility of the FCC. In Fact, in two recent decisions, the FCC recognized a CLEC's right to direct physical access to an ILEC's network at the terminal block. *See Triennial UNE Order*, 18 F.C.C.R. at 17184-86, n.1013; In re Petition of WorldCom, Inc., *Memorandum Opinion and Order*, 17 F.C.C.R. 27039 (2002) (the "*Virginia Arbitration Order*"). In *Triennial UNE Order*, for example, the FCC declared that statutory and regulatory responsibilities require ILECs to provide CLECs with direct physical access to the inside wire subloop. *See* 18 F.C.C.R. at 17184-86, n.1013.

The OCC's denial of a CLEC's right to direct physical access to the inside wire subloop is directly contrary to these and other FCC rulings, and FCC clarification would materially assist the Court in this case. For example, despite the FCC's extended discussion of access to the inside wire subloop, the OCC dismissed the FCC's affirmation of CLECs' rights as "a passing reference." *Report and Recommendations of the Arbitrator*, OCC Docket No. PUD 200300157 at 47 ("Arbitrator's Report"). In so doing, the OCC ignored explicit FCC findings that the type of indirect access that SWBT has proposed and the OCC has approved would not comply with the FCC's regulations. *Triennial UNE Order*, 18 F.C.C.R. Rcd at 17198-99. In fact, in the *Triennial UNE Order*, the FCC rejected any ILEC access scheme that would require CLECs "to undertake a lengthy and burdensome process at the customer premises to 'collocate' a separate terminal facility in order to gain access to the inside wire subloop . . .," *id.* at 17199, and yet the OCC has approved two SWBT access options that are indistinguishable from this hypothetical (and expressly rejected) arrangement.

The FCC likewise prohibited any arrangement that would require the presence of an ILEC's technician whenever a CLEC seeks to disconnect wires on the customer side of the ILEC's terminal so that they can be reconnected to the CLEC's terminal. *Id.* This FCC ruling precludes the SWBT proposal (adopted by the OCC) that would require a SWBT technician to be present before all cross connections could be completed. Contrary to the OCC's findings, the FCC's rulings in the *Triennial UNE Order* confirm that federal rules require ILECs to allow CLECs direct physical access to the inside wire subloop.

The OCC's denial of direct physical access to the inside wire subloop also implicates uniform federal telecommunications regulatory policy because it is inconsistent with the FCC's *Virginia Arbitration Order*. In that case, the FCC ruled that two carriers had a right to direct physical access to Verizon's terminal block when seeking to provide service to customers in MTEs. The FCC found that Worldcom's proposed contract "language enabling its technicians to have direct access to the customer side of Verizon's [network interface device] is consistent with the [1996] Act and our rules," whereas Verizon's proposal "that all cross connection be performed by Verizon technicians" was not. *Virginia Arbitration Order*, 17 F.C.C.R. at 27247. In that same proceeding, the FCC resolved a similar issue in favor of AT&T (the CLEC) and against Verizon (the ILEC), finding that "AT&T . . . should have direct access to all wire on the customer side of the NID [network interface device], *even when that wire is owned by Verizon*." *Id.* at 27243 (emphasis added).[1]

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[1] The FCC's rules and orders, however, do not suggest that this fact should be decisive. This holding is consistent with the FCC's later conclusion in the *Triennial UNE Order* that "[t]he technically feasible points where subloops can be accessed can be further categorized as local loop plant consisting of customer premises wiring owned by the incumbent LEC as far as the

Similarly, the OCC's failure to follow the *Virginia Arbitration Order* on the issue of whether direct physical access to ILECs' inside wire subloops will impair the functioning of networks implicates the FCC's expertise and regulatory authority. In the *Virginia Arbitration Order* the FCC expressly found that granting direct access to AT&T would not conflict with Verizon's desire to maintain the security and integrity of its network and that "dispatching a Verizon technician to perform or oversee AT&T's work on the customer side of the [network interface device] is unnecessary to address the security concerns identified by Verizon in this proceeding." *See id.*

The FCC's decision on this point is directly applicable here. When CLECs access the inside wire subloop at the ILEC's terminal block, they are accessing only a single customer's inside wiring. Network integrity is not an issue because the CLEC is not accessing the portion of the LEC loop that consists of aggregated customer lines. The worst potential consequences of CLEC access on the customer-side of the ILECs' terminal block are crossed wires and temporary mishandling of service for no more than one or two customers, which is a rare occurrence. Despite the FCC's explicit rejection of the argument that customer-side access to inside wiring creates serious network integrity issues, the OCC improperly relied on this rationale in denying Cox's request for direct physical access to SWBT's inside wire subloops. Arbitrator's Report at 47.

The FCC is presently considering these issues in the pending Petition for Declaratory Ruling. With this initial expert review, the Court will have clear guidance through which it can adjudicate Cox's central claims and grant appropriate relief.

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point of demarcation." *See Triennial UNE Order*, 18 F.C.C.R. at 17185. The FCC's intent was to allow CLECs to access ILEC-owned inside wire subloops at any technically feasible point, regardless of whether that plant ended at the terminal block or extended to the point of demarcation.

Accordingly, the Court should stay the action pending an FCC ruling that clarifies Cox's right to direct physical access to SWBT's inside wire subloops, among other issues.

3. Judges Routinely Refer Similar Questions to the FCC for its Initial Review.

Courts routinely refer issues similar to those in the Complaint to the FCC because they fall squarely within the agency's primary jurisdiction and expertise. In a recent case, the Seventh Circuit invoked the primary jurisdiction doctrine to refer claims to the FCC under the provisions added by 1996 Act, observing that the Act and its implementing regulations are the "bailiwick of the FCC." *In re Starnet, Inc.*, 355 F.3d at 639. The court noted that while it could "make an educated guess" as to the then-contested meaning of the word "location" in the 1996 Act, it would be "best to send this matter to the [FCC] under the doctrine of primary jurisdiction" and to stay the action "while the FCC ponders." *Id.* The court also reasoned that, even though "the FCC's position would be subject to review by the judiciary for reasonableness, the agency's views are the logical place for the judiciary to start." *Id. See also Kansas City Power & Light Co. v. American Fiber Systems, Inc.*, 2003 WL 22757927, at *4 (D. Kan. Nov. 5, 2003) (memorandum and order) (invoking primary jurisdiction doctrine to refer to FCC claims under Pole Attachment Act; noting that resolution of such claims "require[d] the expertise of the FCC, and that their resolution is a part of the regulatory scheme Congress delegated to the FCC under the Pole Attachment Act").

Here, the Court is likewise presented with questions that directly implicate the FCC's regulation of matters entrusted to it under the 1996 Act, and with issues that turn on the meaning of technical terms. For example, in clarifying the parameters of a CLEC's right of access to an ILEC's inside wire subloop in MTEs, the FCC will need to consider whether "direct physical access" is required under Section 251 and the attendant regulations. Although the Court certainly could "make an educated guess" as to how this term should be interpreted and applied, that decision is best informed by the expert agency Congress entrusted with such duties. The agency's decision will provide the Court with expert guidance in the first instance, which will materially assist the Court. As in *In re Starnet*, the Court should stay the litigation, permitting the FCC to evaluate and clarify CLECs' rights to direct physical access to ILECs' inside wire subloops.

B. The Court Should Defer to the FCC's Primary Jurisdiction Because the Resolution of the Issues by the FCC Would Ensure a Nationally Uniform Telecommunications Policy.

Congress determined that developing and implementing this country's interstate system for telecommunications regulation requires the expertise of a federal agency. *See* 47 U.S.C. § 151 (creating the FCC "for the purpose of securing a more effective execution of [communications] policy by centralizing authority"). Uniformity in the implementation of communications regulation is plainly necessary. *See MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 496 F.2d 214, 220-24 (3d Cir. 1974) (deferring to FCC under the primary-jurisdiction doctrine to avoid conflict with FCC in resolution of issues). The 1996 Act establishes a complex regulatory framework in specific need of uniform application, which can only come from allowing an administrative body to apply its "special competence." *Writers Guild of Am., West, Inc. v. Am. Broad. Co.*, 609 F.2d 355, 362 (9th Cir. 1979); *cf. Williams Pipe Line*, 76 F.3d at 1497 (concluding that determinations related to tariff indemnity provision required agency expertise and that uniformity would be best ensured by referring the matter to Federal Energy Regulatory Commission).

Staying the instant action pending an FCC ruling serves the goal of ensuring a uniform national telecommunications policy in two important ways. First, there exists a fundamental difference between federal law and Oklahoma law regarding the location of points of demarcation and network interface devices, which has serious and practical implications for local telephone competition. The effect of the OCC's requirement that the demarcation point and the network interface device must be located at the same point forces CLECs to choose between two burdensome options: either (a) they must accept unreasonable conditions on access to ILECs' inside wiring such as those adopted by the OCC, or (b) they must provision duplicative facilities for each customer within an MTE. This is precisely the type of result the FCC's inside wire subloop rules is designed to prevent. Granting a stay pending the FCC's evaluation of this issue in the first instance would ensure that state-specific regulations do not thwart the overarching national policy that encourages local telephone service competition.

Second, a dispositive FCC ruling will eliminate any lingering uncertainty regarding CLECs' rights to direct physical access to ILECs' inside wire subloops. Although the *Virginia Arbitration Order* and the *Triennial UNE Order* should have eliminated such uncertainty, some ILECs continue to take SWBT's position that direct access is inappropriate where the incumbent LEC owns the wiring on the customer-side of its terminal block. Thus, there is significant risk of inconsistent determinations among the state commissions, as the underlying OCC decision demonstrates, and, to the extent the rulings are appealed, among the federal courts. Granting a stay pending the FCC's ruling to address this issue will ensure a uniform national policy to allow and encourage local competition for customers in MTEs in every market. It also will provide the Court with expert guidance to resolve the questions presented.

VI. CONCLUSION

For the reasons stated above, Plaintiff Cox respectfully requests that the Court grant the stay until the earlier of either (a) the FCC's issuance of a dispositive ruling in the parallel administrative proceeding, or (b) six months from the date of the filing of this motion. In either case, Cox will file a status report six months hence to inform the Court on the status of the FCC proceeding.

Respectfully submitted,

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